BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD S. SERRANO)	
Claimant)	
VS.)	
)	Docket No. 176,402
MODERN AIR CONDITIONING COMPANY)	,
Respondent)	
AND)	
)	
FEDERATED MUTUAL INSURANCE and)	
ALLIED INSURANCE COMPANY)	
Insurance Carriers)	

ORDER

Claimant and claimant's present attorney requested review of the August 12, 1999 Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

Claimant and respondent entered into a settlement of this docketed claim which was approved by Special Administrative Law Judge Robert Telthorst on November 19, 1997. That settlement called for a lump sum payment of \$9,000 on a strict compromise of all issues between claimant and respondent plus the medical benefits previously paid. The issues for Appeals Board review concern the apportionment of attorney fees as between claimant's present and former attorneys and the apportionment of the costs for the hearing on this matter of attorney fees. The question of which version of K.S.A. 44-536 applies to this claim was not raised by the parties, and since this question is not determinative of the issues at bar, it will not be addressed. For purposes of this review, the Appeals Board will refer to the present version of the statute.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This appeal arises out of an attorney fee dispute between claimant's former attorney, Diane F. Barger, and the claimant's present attorney, David O. Alegria of McCullough, Wareheim & LaBunker, P.A. Claimant retained Ms. Barger on March 6, 1993. She continued to represent claimant until August 5, 1994, when she terminated her representation of claimant. The contract between claimant and Ms. Barger called for a contingency fee of 25 percent. The Administrative Law Judge found Ms. Barger entitled to attorney fees of \$600 plus expenses of \$147.15. Claimant and Mr. Alegria, claimant's present attorney, object to the Administrative Law Judge's Order. Ms. Barger argues that the fee for an attorney before

the conclusion of the case should be based upon the reasonable value of said attorney's services *in quantum meruit*.¹ She does not object to the amounts awarded in the ALJ's Order.

On June 30, 1994 Ms. Barger filed a Notice of Withdrawal of Attorney, Assertion of Attorney's Fee Lien and Application for Hearing to Determine Attorney's Fees. In that pleading Ms. Barger cited "irreconcilable differences" as the basis for her withdrawal from further representation of claimant and claimed an attorney's fee lien "for 25% of the settlement as and for attorney's fees and \$148.55 for out of pocket expenses." Administrative Law Judge Floyd V. Palmer entered an Order Approving Withdrawal of Counsel on August 5, 1994. Ms. Barger's itemization of time spent, Exhibits 1 and 2 to the August 6, 1999 hearing, show totals of 45.5 and 61.4 hours respectively. At the hearing Ms. Barger also claimed expenses totaling \$147.10 (Exhibit 3).

The Statement Regarding Attorney Fees prepared by David O. Alegria was offered at and made a part of the record of the November 19, 1997 Settlement Hearing proceedings. That document shows that Mr. Alegria is claiming attorney fees "in the total amount of \$2,250.00, which is 25 percent of the amount of compensation to be recovered and paid on behalf of the employee." In that same document Mr. Alegria also states that "approximately 30 hours were expended by me in the course of the legal representation of the employee." The contract of employment between claimant and Mr. Alegria was entered into on March 5, 1995.

Ms. Barger's contract with claimant, dated March 6, 1993, which is Exhibit 5 to the Transcript of the August 6, 1999 Motion on Attorney Fees Hearing, provides:

It is further understood and agreed that my said attorney shall not be entitled to any compensation for her services, unless and until settlement or collection of my claim has been made, and that my attorney shall have no right to compromise or settle my claim without my consent, but may litigate the claim. My attorney may file for a formal hearing before the Workers' Compensation Director at her option, and this contract gives my consent thereto. It is further understood and agreed that shall I at any state of the proceedings, for any reason, desire to terminate this contract I agree to pay my said attorney what they determine to be in a reasonable amount for their services performed and expenses incurred prior to the time of termination of the contract as shown by an itemization thereof.

It is interesting to note that the Workers' Compensation Contract for Employment of Attorney between claimant and Mr. Alegria contains a similar provision:

It is further understood and agreed that if I desire to terminate this contract for any reason at any time, I agree to pay my attorneys what is determined to be a reasonable amount for their services performed and litigation expenses incurred prior to the time of termination of the contract. It is understood that the

¹ See Madison v. Goodyear Tire & Rubber Co., 8 Kan. App. 2d 575, 663 P.2d 663 (1983).

Director of Workers' Compensation has jurisdiction over the reasonableness of fees.

The fact that Ms. Barger withdrew instead of being terminated does not prevent counsel from receiving compensation for her services. She represented claimant beyond the December 10, 1993, preliminary hearing and the appeal of that Order to the Board. She provided valuable services to claimant which resulted in claimant receiving medical treatment and, in part, in claimant's ultimate ability to conclude his claim for a compromise amount. Ms. Barger does not dispute the amount awarded to her by the ALJ. Therefore, the Appeals Board finds the award of \$600.00 to Ms. Barger to be a reasonable and appropriate amount under the facts and circumstances of this case.

Mr. Alegria also questions "whether Claimant's attorney should be required to pay one-half of the cost of the transcript of the hearing of August 6, 1999." Judge Avery's August 12, 1999 Order does not specify who is to pay the costs. But at page 11 of the transcript of the August 6, 1999 proceedings Judge Avery announced that "the expenses for the court reporter will be billed jointly." If that is interpreted to mean Mr. Alegria and Ms. Barger are to each pay one-half, it is a reasonable division and should also be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Brad E. Avery dated August 12, 1999, should be, and is hereby, affirmed.

Dated this ____ day of December 1999. BOARD MEMBER BOARD MEMBER

c: David O. Alegria, Topeka, KS
John G. Atherton, Emporia, KS
John A. Bausch, Topeka, KS
Diane F. Barger, Wichita, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director

IT IS SO ORDERED.

BOARD MEMBER

² See Rucker v. Rio Optical Corporation, 20 Kan. App. 2d 233, 885 P.2d 1270 (1994).